

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	§	
	§	
COMANCHE HORIZON CORPORATION,	§	CASE NO. 01-50526-RLJ-7
	§	
DEBTOR.	§	

MEMORANDUM OPINION

Before the court is the motion by FarmPro Services, Inc. (FarmPro) seeking allowance of an administrative claim under section 503(b)(1)(A) of the Bankruptcy Code. The motion is opposed by Valley Irrigation and Pump Services, Inc. (Valley) and Harvey Morton, the Chapter 7 Trustee.

Findings of Fact

1. Comanche Horizon Corporation (Comanche) filed bankruptcy under Chapter 11 of the Bankruptcy Code on April 26, 2001. Shortly before the bankruptcy filing, on April 17, 2001, Comanche entered into a loan agreement with FarmPro under which FarmPro agreed to extend up to \$1,980,616 of credit to be used by Comanche in the production of Comanche's 2001 crops (the Operating Loan).
2. Prior to the 2001 crop year, FarmPro had loaned Comanche approximately \$3.8 million, evidenced by four promissory notes, to finance Comanche's 2000 crops. Because of a crop failure, Comanche was unable to repay the 2000 crop loans.
3. The documents evidencing the Operating Loan contemplate that FarmPro would be secured by virtually all of Comanche's property, including real property, inventory, equipment, farm products,

crops, general intangibles, government payments, and crop insurance. As additional security, Comanche agreed to assign to FarmPro Comanche's recovery, if any, in a products liability suit it asserts against Dow Chemical. Under the Operating Loan documents, any recovery from the products liability suit are first to be applied to the amount unpaid from the 2000 loans, and then applied against the Operating Loan.

4. On June 5, 2001, Comanche filed a motion requesting that the court approve and ratify the Operating Loan, which had been entered into shortly before the bankruptcy filing. As Comanche and FarmPro had already entered into the Operating Loan, there was no specific action to approve or disapprove and the court therefore denied the motion by order entered July 5, 2001.

5. Comanche's Chapter 11 case was converted to Chapter 7 on April 30, 2002. Harvey Morton, the Trustee, has collected approximately \$528,000.¹

6. FarmPro's proof of claim, filed July 26, 2002, asserts an unsecured priority claim in the amount of \$1,715,711.96.² The unsecured priority claim is based upon postpetition advances made by FarmPro in the total principal amount of \$1,655,663.52, plus interest of \$72,051.04. *See* FarmPro's Exhibit A.

7. During the course of the hearing, FarmPro further amended its unsecured priority claim, first, to \$1,448,000, and then to \$1,311,442.10.

8. In addition to the \$1,311,442.10, FarmPro asserts an unsecured priority claim in the amount

¹The Trustee further advised the court that he has recovered approximately \$438,000 from the auction of farm equipment.

²The total amount claimed by the proof of claim is \$3,179,682.69. The proof of claim further reflects that it is secured by equipment, crops, proceeds, etc. with the total value of \$4,707,312.

of \$103,348.99, which, according to FarmPro, represents funds advanced to Comanche by High Plains Peanut Company, Inc., an affiliate of Comanche, for the purpose of harvesting the 2001 peanut crop. Such funds were pledged by High Plains Peanut Company, Inc. to FarmPro. FarmPro also requests an administrative claim in the amount of \$46,077, representing funds that FarmPro paid to Golden Peanut Company to have a portion of Comanche's 2001 crop removed from storage and timely delivered to market to avoid spoilage of the crop. The Trustee does not oppose the \$46,077 administrative claim.

9. It is undisputed that the 2001 crop was planted after Comanche filed its Chapter 11 proceeding.

10. By asserting the three administrative claims, FarmPro is conceding, and so stipulated, that such claims are unsecured and that FarmPro holds no lien against the 2001 crop proceeds.

11. Under the terms of the Operating Loan, FarmPro advanced Comanche \$1,804,257.35 between April 23, 2001 and June, 2002. The Operating Loan provided that FarmPro would make advances to Comanche (or for Comanche's benefit) as needed in the course of producing and harvesting the 2001 crop. Specifically, Comanche would request product from a supplier, which supplier would then contact FarmPro for authorization to proceed. Upon approval by FarmPro, the supplier would provide the product or services to Comanche and then bill FarmPro directly for the cost of such product or services. FarmPro would then charge the cost of such product or services to Comanche's account.

12. If appropriate, these findings of fact shall be considered conclusions of law.

Conclusions of Law

13. The court has jurisdiction over this matter under 28 U.S.C. § 1334 and 11 U.S.C. § 503(b)(1)(A). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

14. Section 503(b)(1)(A) provides that, after notice and a hearing, the court shall allow a claim for administrative expenses, including “the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.” 11 U.S.C. § 503(b)(1)(A) (2002).

The purpose of Section 503 is to permit the debtor’s business to operate for the benefit of its prepetition creditors. In order to effectuate a successful reorganization, third parties must be willing to furnish postpetition goods or services on credit. . . . Section 503 requires that such claims be given priority, therefore inducing third parties to extend credit and enhancing the likelihood of a successful reorganization.

Toma Steel Supply Inc. v. Transamerican Natural Gas Corp. (In the Matter of Transamerican Natural Gas Corp.), 978 F.2d 1409, 1415-16 (5th Cir. 1992), *quoting In re Coastal Carriers Corp.*, 128 B.R. 400, 403 (Bankr. D. Md. 1991). Furthermore, “the principal purpose of according administrative priority to claims for benefit to the estate is to prevent unjust enrichment of the debtor’s estate, rather than simply to compensate the creditor.” *In the Matter of Transamerican Natural Gas Corp.*, 978 F.2d at 1419-20, *quoting In the Matter of Strause*, 40 B.R. 110, 113 (Bankr. W.D. Wis. 1984).

15. The Code does not require an “altruistic intent” as a prerequisite to recovery under section 503. *Hall Fin. Group Inc. v. DP Partners Ltd. P’ship (In the Matter of DP Partners Ltd. P’ship)*, 106 F.3d 667, 673 (5th Cir. 1997). Rather, FarmPro must establish that its advances were actual and necessary costs and expenses of preserving the bankruptcy estate. *See Transamerican Natural Gas*

Corp., 978 F.2d at 1416.

16. The term ‘actual and necessary’ is construed narrowly: “the debt must benefit the estate and its creditors.” *Id.* (internal quotation omitted). The administrative claimant bears the burden of establishing a prima facie case under section 503(b)(1)(A). *See id.* Such a prima facie case may be established by evidence that: (1) the claim arises from a transaction with the debtor-in-possession; and (2) the goods or services supplied enhanced the ability of the debtor-in-possession’s business to function as a going concern. *See id.*; *In re SGS Studio Inc.*, 256 B.R. 580, 582 (Bankr. N.D. Tex. 2000)(Felsenthal, J.). Once the claimant has met this burden, the burden of producing evidence to the contrary shifts to the objector, whose mere allegations, unsupported by evidence, are insufficient to rebut the claimant’s prima facie case. *See Transamerican Natural Gas Corp.*, 978 F.2d at 1416. The burden of persuasion, however, remains with the claimant, which he meets by a preponderance of the evidence. *See id.*

Whether FarmPro’s Claims Arise out of Transactions with DIP

17. An administrative claim under section 503(b)(1)(A) must arise from transactions with the debtor-in-possession, as opposed to the prepetition entity. *See id.* The administrative claim must have arisen postpetition. As explained by the Fifth Circuit, “[i]n order to qualify as an ‘actual and necessary’ cost under section 503(b)(1)(A), a claim against the estate must have arisen post-petition and as a result of actions taken by the trustee that benefitted the estate.” *Total Minatome Corp. v. Jack/Wade Drilling Inc. (In the Matter of Jack/Wade Drilling Inc.)*, 258 F.3d 385, 387 (5th Cir. 2001). The question that arises, therefore, is whether FarmPro’s advances constituted a prepetition or postpetition loan. Only if the advances under the Operating Loan arose as a result of transactions between

FarmPro and Comanche as debtor-in-possession will such advances be eligible for section 503(b)(1)(A) treatment. *See id.* In this context, the court's July 5, 2001, order denied ratification of the Operating Loan because the court found that the parties had already entered into the Operating Loan. This does not resolve the section 503(b)(1)(A) claim, however.

18. A claim is not rendered a postpetition claim simply by the fact that the time for payment is triggered by a postpetition event. *See Chiasson v. J. Louis Matherne & Assocs. (In the Matter of Oxford Mgmt. Inc.)*, 4 F.3d 1329, 1335 n.7 (5th Cir. 1993). "If a right to payment becomes vested prior to commencement of the bankruptcy case, the claim becomes a pre-petition claim." *Id.* Claims that arise from a creditor's prepetition services to the estate are not entitled to administrative expense treatment; only postpetition services are eligible for administrative priority. *See Kadjevich v. Kadjevich (In re Kadjevich)*, 220 F.3d 1016, 1019-20 (9th Cir. 2000). Stated differently, the services performed by an administrative claimant must have been induced by the debtor-in-possession, rather than by the prepetition entity, in order for such services to receive administrative priority. *See, e.g., In re Enron Corp.*, 279 B.R. 695, 705 (Bankr. S.D.N.Y. 2002).

19. In *In re East Tex. Steel Facilities Inc.*, a bank issued a prepetition irrevocable letter of credit on behalf of the debtor and in favor of one of the debtor's suppliers. *Berliner Handels-Und Frankfurter Bank v. East Tex. Steel Facilities Inc. (In re East Tex. Steel Facilities Inc.)*, 117 B.R. 235, 238 (Bankr. N.D. Tex. 1990)(Abramson, J.). The debtor received two postpetition shipments of steel from its supplier, which, upon the debtor's failure to pay, presented its claims for the two shipments to the bank. *See id.* The bank paid the \$1.6 million cost of the two shipments pursuant to its irrevocable letter of credit. *See id.* Among its arguments, the bank contended that it was entitled to an

administrative claim under section 503(b) for the \$1.6 million. *See id.* The court rejected the bank's argument for two reasons. First, the court held that the claim was a prepetition claim:

BHF also claims that it has an administrative priority because of its postpetition extension of credit to the Debtor pursuant to 11 U.S.C. § 364. This argument overlooks the fact that BHF and East Texas entered into a letter of credit agreement prior to the petition date. The agreement between the Debtor and BHF was a prepetition agreement. BHF's payments to Mannesmann merely acted to change the character of the claim by converting a contingent claim to a fixed claim.

* * *

To determine the character of the transaction, the Court looks to the time the agreement was consummated, not the time which the performance was made. It is established that a debt is not entitled to priority as a cost and expense of administration simply because the claimants' right to payment arises after the debtor-in-possession has taken some action. For example, the mere happenstance of delivery after the filing of bankruptcy under a prepetition contract neither creates a postpetition contract nor entitles the seller to an administrative claim. Obligations which arise out of prepetition contracts, but are due postpetition, are prepetition debts. The payment by BHF to Mannesmann was the result of a prepetition obligation and is therefore a prepetition debt. BHF may not claim an administrative priority for this prepetition obligation.

Id. at 242-43 (internal quotations and citations omitted).

Second, the court rejected the bank's argument because the court held (somewhat akin to the first reason) that the bank failed to meet the first element of the test for administrative priority: the claim did not arise from a transaction which was induced by the debtor-in-possession. *See id.* at 243. The bank entered into the letter of credit agreement with the prepetition entity. *See id.* "If the inducement came from the pre-petition debtor, then consideration was given to the pre-petition entity rather than to the debtor-in-possession. However, if the inducement came from the debtor-in-possession, then the claims of the creditor are given priority." *Id.*, quoting *Employee Transfer Corp. v. Grigsby (In re White Motor Corp.)*, 831 F.2d 106, 110 (6th Cir. 1987).

20. The facts of this case are distinguishable from the facts of *In re East Tex. Steel Facilities Inc.* Under section 365(c)(2) of the Code, Comanche was prohibited from assuming the Operating Loan as such loan is an executory contract to provide debt financing or financial accommodations to Comanche. See 11 U.S.C. § 365(c)(2) (2002)³; *Huntington Nat'l Bank Co. v. Alix (In re Cardinal Indus. Inc.)*, 146 B.R. 720, 732 (Bankr. S.D. Ohio 1992) (holding that creditor, which entered into prepetition agreement with the debtor to provide the debtor with a line of credit, and which subsequently advanced funds under the line of credit postpetition, was entitled to insist on the application of section 365(c)(2) to free itself of any obligation to continue postpetition advances under the line of credit); *Farmer v. Crocker Nat'l Bank (In re Swift Air Lines Inc.)*, 30 B.R. 490, 496-97 (B.A.P. 9th Cir. 1983)(holding that section 365(c)(2) prohibited assumption of letter of credit agreement with bank even though such letter of credit provided that the debtor may draw upon it if debtor is in bankruptcy). But see *In re TS Indus. Inc.*, 117 B.R. 682, 687-88 (Bankr. D. Utah 1990) (holding that executory contract of type otherwise unassumable under section 365(c)(2) may be assumed when such contract was entered into in contemplation of bankruptcy and for the specific purpose of providing debtor-in-possession financing).

21. As of the filing of the petition, FarmPro was under no obligation to continue funding under the Operating Loan. Each advance made by FarmPro to cover Comanche's expenses was a voluntary decision by FarmPro to extend financing for the specific expense item.

22. The Fifth Circuit has explained that "[i]n order to qualify as an 'actual and necessary' cost

³Section 365(c)(2) provides that the trustee (or debtor-in-possession) "may not assume or assign any executory contract or unexpired lease of the debtor . . . if (2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor" 11 U.S.C. § 365(c)(2).

under section 503(b)(1)(A), *a claim against the estate must have arisen post-petition.*” *Total Minatome Corp. v. Jack/Wade Drilling Inc. (In the Matter of Jack/Wade Drilling Inc.)*, 258 F.3d 385, 387 (5th Cir. 2001). FarmPro did not loan Comanche the full amount of the Operating Loan prepetition to be used by Comanche in its attempted reorganization. The majority of the advances were made postpetition. Until funds were actually advanced, FarmPro had no right to repayment. Until the funds were actually advanced and FarmPro was entitled to repayment, FarmPro had no “claim” against Comanche. 11 U.S.C. § 101(5) (definition of “claim”).

23. In *In re East Tex. Steel Facilities Inc.*, the claim at issue arose out of an irrevocable prepetition letter of credit. The bank’s obligation was fixed. *See In re East Tex. Steel Facilities Inc.*, 117 B.R. at 243. *See also In re Precision Carwash Corp.*, 90 B.R. 34, 38 (Bankr. E.D.N.Y. 1988) (“Where the liability for the services in question is irrevocably incurred before the petition is filed, such services are not induced by the debtor-in-possession and do not qualify for administration status”). The bank’s right to payment became absolutely vested prepetition, subject only to the condition that a claim be made against the letter of credit. “Obligations which arise out of prepetition contracts, but are due postpetition, are prepetition debts.” *In re East Tex. Steel Facilities Inc.*, 117 B.R. at 243. Unlike in *East Tex. Steel Facilities Inc.*, FarmPro was under no obligation to continue advances pursuant to the Operating Loan postpetition. Although FarmPro had a prepetition contract with Comanche, its obligation to advance funds was not a prepetition obligation. FarmPro extended postpetition credit voluntarily. As testified to by its president, FarmPro believed that further advances were the only way that FarmPro would be able to recover anything from Comanche. Additionally, FarmPro’s president testified that FarmPro had discretion whether to approve the payment of invoices that were sent to it for

payment on behalf of Comanche. Suppliers of products or services to Comanche had to obtain advance approval from FarmPro before FarmPro would pay the costs of such products or services. The exercise of such discretion took place, for the most part, after the case was filed.

24. “If a right to payment becomes vested prior to commencement of the bankruptcy case, the claim becomes a pre-petition claim.” *In the Matter of Oxford Mgmt. Inc.*, 4 F.3d at 1335 n.7. FarmPro’s right to payment could not have become vested until it actually advanced funds, the majority of which were advanced postpetition. Until Comanche actually borrowed against the Operating Loan, and until FarmPro actually advanced funds, FarmPro had no right to payment. “It is only when the debtor-in-possession’s actions themselves – that is, considered apart from any obligation of the debtor – give rise to a legal liability that the claimant is entitled to the priority of a cost and expense of administration. . . . In determining administrative priority, courts look to when the acts giving rise to a liability took place, not when they accrued.” *Bachman v. Commercial Fin. Serv. Inc. (In re Commercial Fin. Serv. Inc.)*, 246 F.3d 1291, 1294-95 (10th Cir. 2001). In the present case, the advances by FarmPro, and the resulting liability of Comanche, arose postpetition, with Comanche as debtor-in-possession. But for the actions of Comanche, undertaken as debtor-in-possession, Comanche would not have been liable to FarmPro. In *In re East Tex. Steel Facilities Inc.*, the actions of an intervening third party triggered liability under an agreement between the creditor and the prepetition entity.

25. FarmPro’s advances arose from transactions which were induced by the debtor-in-possession. Although the Operating Loan arose out of a transaction with the prepetition entity, each postpetition advance was induced by Comanche. Comanche made the determination that a particular

expense was necessary in the operation of its business. Comanche then convinced FarmPro that such expense was so necessary. FarmPro then made two decisions: first, that the expense was proper and necessary; second, that FarmPro would in fact advance for the expense. The Operating Loan was contemplated to be a secured line of credit. The bankruptcy filing and the effect of section 552 of the Code jeopardized FarmPro's secured position – at least as to the postpetition crops. FarmPro then sought ratification of the Operating Loan, which was unsuccessful. FarmPro had the option of discontinuing advances. *See* 11 U.S.C. § 365(c)(2). The motivating factor for FarmPro in continuing to advance under the Operating Loan was to assist Comanche in its reorganization and to thereby maximize the value of Comanche's bankruptcy estate and afford Comanche an opportunity to repay its debts. Thus, FarmPro's actions with respect to the Operating Loan involved Comanche as debtor-in-possession, and FarmPro's intent in advancing funds was to enhance Comanche as debtor-in-possession. The vast majority of the advances, i.e. the consideration that FarmPro provided under the Operating Loan, went to Comanche as debtor-in-possession, not Comanche as the prepetition entity.

Whether FarmPro's Advances Enhanced the Ability of Comanche's Business to Function as a Going Concern

26. The inquiry under section 503(b)(1)(A) is whether the estate and its creditors received an actual benefit from the expenses forwarded by the administrative claimant. *See In re Southern Soya Corp.*, 251 B.R. 302, 309 (Bankr. D.S.C. 2000). “The mere potential of benefit to the estate is insufficient for the claim to acquire status as an administrative expense.” *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 866 (4th Cir. 1994). The debtor-in-possession must receive an actual benefit during the period that it is attempting reorganization. *See In re Southern Soya Corp.*, 251 B.R. at

309. Benefit may still accrue even if the debtor's attempt at reorganization eventually failed, the debtor continued to operate at a loss, or that the expenses incurred by the administrative claimant failed to add value to the estate's property. *See id.* (“[T]he outcome of the bankruptcy case is not conclusive indicia of whether the extension of credit was beneficial to the estate.”); *In re Molnar Bros.*, 200 B.R. 555, 559-60 (Bankr. D.N.J. 1996); *White Front Feed & Seed, Div. of Paul Lammers & Sons, Inc. v. State Nat'l Bank of Platteville (In re Ramaker)*, 117 B.R. 959, 962 (Bankr. N.D. Iowa 1990) (“This court does not accept the hindsight argument that feed, seed, and fertilizer are not necessary expenses of a crop and livestock farming operation merely because the reorganization later fails”).

27. Court approval prior to advancing necessary costs and expenses is not a prerequisite to having such advances treated as administrative expenses pursuant to section 503(b)(1)(A) so long as the requirements of section 503(b)(1)(A) are otherwise met. *See In re Sound Radio Inc.*, 145 B.R. 193, 211 (Bankr. D.N.J. 1992); *In re Lewiston Steam & Power Assocs.*, 1989 WL 1109341*4 (Bankr. N.D. Ohio 1989).

28. While the 2001 crop year was unsuccessful, Comanche's 2001 crop nonetheless generated \$528,000 in proceeds. FarmPro advanced Comanche the funds necessary to purchase the seed, fertilizer and insecticide which made the crop possible. FarmPro further advanced Comanche the funds necessary to maintain and harvest the crop. The crop would not have been possible but for FarmPro's advances. FarmPro's advances allowed Comanche to continue to operate as an ongoing concern. The advances paid a portion of Comanche's labor costs, equipment repair and maintenance, insurance, and utility expenses. The funds advanced by FarmPro allowed certain creditors to continue doing business with Comanche. Valley, which objects to allowance of an administrative priority claim,

was paid in excess of \$88,000 for services provided postpetition.

29. The funds advanced by FarmPro benefitted both the bankruptcy estate and Comanche's creditors. An administrative claimant can benefit the estate without such benefit adding value to the debtor's property. *See, e.g., In re Southern Soya Corp.*, 251 B.R. at 309; *In re Ramaker*, 117 B.R. at 962. As stated by the Fifth Circuit, "[a]lthough the amount to be allowed as an administrative expense must be measured in dollars and cents . . . the question whether the estate has been benefitted cannot be so narrowly confined." *Transamerican Natural Gas Corp.*, 978 F.2d at 1420. Aside from the benefit conferred by FarmPro in the form of the 2001 crop, FarmPro's advances produced additional, albeit intangible, benefits. They allowed Comanche to continue as a going concern and to preserve its assets, especially its machinery which requires frequent servicing. But for FarmPro's advances, Comanche's case would have never existed as a Chapter 11 with the opportunity of survival.

30. FarmPro met its burden of demonstrating that the expenses advanced by it constituted actual and necessary expenses that preserved and benefitted the estate and its creditors. *See, e.g., In re Ramaker*, 177 B.R. at 961-62 (holding that party met its burden of entitlement to administrative claim for providing feed, seed, and fertilizer to chapter 11 debtor-in-possession because such expenses were necessary in a farming operation and because such expenses benefitted the estate). *See also Kadjevich v. Kadjevich (In re Kadjevich)*, 220 F.3d 1016, 1019 (9 th Cir. 2000) ("In general, post-petition business expenses are granted administrative-expense priority"). Neither Valley nor the Trustee dispute that the expenses funded by FarmPro benefitted and preserved the estate.

Trustee's Arguments

31. The Trustee opposes the allowance of an administrative claim for FarmPro, arguing that

FarmPro never intended its loan to constitute an unsecured debt allowable as an administrative expense under section 503(b)(1). It is not necessary that the administrative claimant intend its claim to constitute an administrative claim. *See In re Southern Soya Corp.*, 251 B.R. at 307; *Sapir v. CPQ Colorchrome Corp. (In re Photo Promotion Assocs. Inc.)*, 87 B.R. 835, 840-41 (Bankr. S.D.N.Y. 1988) (holding that creditor which provided postpetition funding intending to have such postpetition funding secured by a lien may nevertheless recover such funding as administrative expense). FarmPro's selfish motive in advancing the funds to Comanche is irrelevant. *See State of Texas v. Lowe (In the Matter of H.L.S. Energy Co. Inc.)*, 151 F.3d 434, 437 (5th Cir. 1998) (noting that "the conceptual justification for administrative expense priority [is] that creditors must pay for those expenses necessary to produce the distribution to which they are entitled"); *In re Canton Jubilee Inc.*, 253 B.R. 770, 775 (Bankr. E.D. Tex. 2000) ("an [administrative expense] applicant need not purge itself of any selfish intent in rendering such services nor give any advance warning of an intent to seek such an award").

Valley's Arguments

32. Valley argues that the Operating Loan is an executory contract that cannot be assumed by Comanche pursuant to section 365(e)(2)(b). Section 365(e)(2)(b) is inapplicable. Rather, section 365(c)(2) provides that the trustee may not assume any executory contract if "such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor." 11 U.S.C. § 365(c)(2) (2002). Under section 365(c)(2), the trustee or debtor-in-possession is prohibited from assuming the executory contract, and the party that agreed to provide financing or financial accommodations is under no obligation to fulfill the requirements of such executory contract. *See, e.g., Transamerica Commercial Fin. Corp. v. Citibank (In re Sun Runner Marine*

Inc.), 945 F.2d 1089, 1091-93 (9th Cir. 1991). The executory contract may not be assumed even if the party providing financing consents to an assumption. *See id.* at 1092-93.

33. That section 365(c)(2) may have freed FarmPro of any obligation to continue funding pursuant to the Operating Loan means only that FarmPro's postpetition advances were voluntary. Typically, a section 503(b)(1)(A) administrative claimant voluntarily provides funds to the debtor which in turn benefit the estate. The purpose of section 503(b)(1)(A) is, in part, to induce creditors to voluntarily assist the debtor's efforts to reorganize. *See Toma Steel Supply Inc. v. Transamerican Natural Gas Corp. (In the Matter of Transamerican Natural Gas Corp.)*, 978 F.2d 1409, 140-41 (5th Cir. 1992). FarmPro should not be barred from recovering its expenses as an administrative claim, assuming that it meets the requirements of section 503(b)(1)(A).

34. Valley also argues that FarmPro failed to follow the provisions of section 364 and therefore failed to properly secure the Operating Loan, meaning that FarmPro is a general unsecured creditor, and that it should not now be allowed to bootstrap its position. It is not altogether clear that FarmPro failed to follow the provisions of section 364, because FarmPro did not bring its motion to ratify the Operating Loan as a motion under section 364.⁴

35. Given that FarmPro intended to extend *secured* credit under the Operating Loan and assuming that section 364 is applicable, FarmPro arguably failed to follow the dictates of section 364(c) or (d), which requires court approval for secured loans. Established case law holds that a postpetition creditor who fails to obtain court approval of a postpetition security interest may not 'fall back' on the

⁴Section 364(a) allows the trustee (and debtor-in-possession) to obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) as an administrative expense.

provisions of section 364(a), which authorizes a debtor-in-possession to obtain unsecured credit in the ordinary course of business without court approval, and to have such credit allowed as an administrative expense. *See In re Southern Soya Corp.*, 251 B.R. at 306-07; *In re Braniff Int'l Airlines Inc.*, 164 B.R. 820, 830-31 (Bankr. E.D.N.Y. 1994); *Sapir v. CPQ Colorchrome Corp. (In re Photo Promotion Assocs. Inc.)*, 87 B.R. 835, 840-41 (Bankr. S.D.N.Y. 1988), *aff'd*, 881 F.2d 6 (2d Cir. 1989). However, these same cases hold that a creditor that fails to secure its postpetition funding may nonetheless recover such funding as an administrative expense if such creditor meets the requirements of section 503(b)(1)(A). *See In re Southern Soya Corp.*, 251 B.R. at 306-07 (granting creditor administrative expense claim for postpetition funds creditor advanced pursuant to line of credit); *In re Climax Chem. Co.*, 167 B.R. 665, 666 n.4 (Bankr. D.N.M. 1994); *In re Photo Promotion Assocs. Inc.*, 87 B.R. at 840-41 (“The fact that Colorchrome was not induced to extend unsecured credit to the debtor pursuant to 11 U.S.C. § 364(a) does not preclude Colorchrome from asserting an administrative priority claim for the actual and necessary expenses which it incurred in preserving the orders from the debtor’s customers for mounted individual and family portraits”). Stated differently, the debtor need not have lured the creditor to advance funds under the promise that such funds would be treated as administrative expenses pursuant to the debtor’s authority to incur debt under section 364(a). “[T]he Debtor can offer § 503(b)(1) priority under § 364(a), as an inducement to extend post-petition credit. But a creditor can also prove entitlement to the priority position under § 503(b)(1)(A) if it shows that the expense arises out of a transaction with the debtor and the expense benefits the debtor-in-possession in the operation of its business.” *In re Climax Chem. Co.*, 167 B.R. at 666.

36. FarmPro's failure to secure the Operating Loan under section 364(c) or 364(d), as well as its possible inability to have advances under the Operating Loan approved under section 364(a), does not prevent FarmPro from asserting an administrative claim under section 503(b)(1)(A) for postpetition credit. *See id.*

37. FarmPro's request for an administrative claim does not bootstrap its position and does not grant it the very status that the court denied in its order of July 5, 2001. Unlike FarmPro's original motion to ratify the Operating Loan, any recovery by FarmPro as an administrative claimant does not satisfy any prepetition advances, but instead, covers specific postpetition advances. In entering into the Operating Loan, FarmPro intended to be a fully secured creditor. Allowance of an administrative claim for postpetition advances does not enhance FarmPro's position. If secured, FarmPro would recover its collateral. As an administrative claimant, FarmPro must meet the standards of section 503(b)(1), i.e., its advances must cover expenses which were actual and necessary and assisted in preserving the bankruptcy estate. FarmPro may also face the prospect of an administratively insolvent estate.

Expenses Recoverable as Administrative Expenses

38. Not all of FarmPro's advances are recoverable under section 503(b)(1)(A) as administrative expenses. In this context, FarmPro's exhibit 13 provides the date and reason for each advance.

39. Several of the items posted to Comanche's account were posted prepetition, and are not recoverable under section 503(b)(1)(A). *See Total Minatome Corp. v. Jack/Wade Drilling Inc. (In the Matter of Jack/Wade Drilling Inc.)*, 258 F.3d 385, 387 (5th Cir. 2001). The expenses posted to Comanche's account after April 26, 2001, are considered for administrative priority. Seed, fertilizer,

irrigation, repairs, fuel, and wages are certainly necessary expenses in the operation of Comanche's business and thus may be recovered under section 503(b)(1)(A). *See Equitable Gas Co. v. Equibank (In re McKeesport Steel Castings Co.)*, 799 F.2d 91, 94-95 (3d Cir. 1986) (holding that utility expenses provided postpetition were recoverable as administrative expenses if such expenses preserved the debtor's estate); *In re Express One Int'l Inc.*, 217 B.R. 207, 211 (Bankr. E.D. Tex. 1998) (allowing section 503(b)(1)(A) administrative claim for repair work performed on the debtor's equipment); *In the Matter of Concrete Prods. Inc.*, 208 B.R. 1000, 1010 (Bankr. S.D. Ga. 1996) ("Section 503(b)(1)(A) authorizes administrative expense treatment of claims for actual, necessary costs and expenses of preserving the estate, including, wages, salaries or commissions for services rendered"); *White Front Feed & Seed, Div. of Paul Lammers & Sons. Inc. v. State Nat'l Bank of Platteville (In re Ramaker)*, 117 B.R. 959, 962 (Bankr. N.D. Iowa 1990) (allowing administrative claim for feed, seed, and fertilizer supplied to Chapter 11 farm operation because such expenses were necessary in the operation of the debtor's farming business).

40. FarmPro's administrative claim, as amended at the hearing, satisfies the requirements for an administrative claim under section 503(b)(1)(A).

The \$46,077 Claim

41. FarmPro requests an additional administrative claim in the amount of \$46,077. This amount was advanced by FarmPro to Golden Peanut Company to have a portion of Comanche's 2001 crop removed from storage and shipped to market, in order to avoid spoilage of the crop. Harvey Morton, the Trustee, does not oppose this claim, admitting that the crop (peanuts) would have indeed spoiled had FarmPro not advanced the funds to have the crop shipped to market. Valley objects to the

allowance of this claim, but offered no evidence or argument to rebut that such advance was actual and necessary and helped preserve the estate.

42. FarmPro has carried its burden of presenting a prima facie case that this expenditure was an actual and necessary expense that preserved the estate, especially in light of the Trustee agreeing with FarmPro's claim. Valley failed to introduce any contravening facts or arguments sufficient to rebut FarmPro's prima facie case. FarmPro has satisfied its burden of persuasion and shall be allowed the additional administrative claim of \$46,077. *See Toma Steel Supply Inc. v. Transamerican Natural Gas Corp. (In the Matter of Transamerican Natural Gas Corp.)*, 978 F.2d 1409, 1416 (5th Cir. 1992).

The \$103,348.99 Claim

43. High Plains Peanut is an entity affiliated with Comanche. High Plains sold its peanut crop at the end of the 2001 peanut crop year. Comanche, unable to pay its operating expenses, used \$103,348.99 of the High Plains' crop proceeds to fund its own operations. These crop proceeds were pledged to FarmPro under separate security agreements. FarmPro seeks a third administrative claim to cover the pledged funds used by Comanche.

44. The court is satisfied and finds that these advances were indeed used by Comanche in the operation of its business and that such funds were actual and necessary costs incurred for the preservation of Comanche's estate. FarmPro's administrative claim for this sum is approved.

Conclusion

45. Upon the foregoing findings of fact and conclusions of law, the court approves the three administrative claims in favor of FarmPro in the amounts of \$1,311,442.10, \$46,077, and

\$103,348.99, respectively.

46. If appropriate, these conclusions of law shall be considered findings of fact.

SIGNED December 4, 2002.

ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE